IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision :

Sukha Singh Vs. State of Punjab

CORAM: **Hon'ble Mr. Justice Virender Singh**

Present: Mr. PS Sekhon, Advocate, for the appellant.
Mr. BS Sewak, DAG, Punjab.

Virender Singh, J.

Appellant Sukha Singh son of Kehar Singh, aged 60 years (on the date of alleged recovery), resident of village Takipur, police station Longowal, District Sangrur stands convicted under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1988 (for short the `Act') for allegedly keeping in his conscious possession 72 Kgs of poppy husk in two gunny bags (36 Kgs in each bag) vide impugned judgment of learned Judge, Special Court, Sangrur and has been sentenced to undergo RI for ten years and to pay a fine of Rs. one lac, in default thereof to suffer further RI for two years.

The prosecution case in brief is that on 25-6-1996 SI Harmik Singh (PW5) along with other police officials including HC Balbir Singh

(PW4) was on patrol duty in a private vehicle. When they reached near the bridge of minor canal of village Takipur, the appellant was seen coming on a bicycle having one gunny bag on the carrier and another gunny bag in the centre of the bicycle. On seeing the police party, he tried to turn back but was apprehended. On interrogation he revealed his name, parentage and the address. He was apprised of his right as envisaged under Section 50 of the Act and after he reposed his faith in aforesaid SI Harmik Singh, a consent memo was prepared, which was thumb marked by the appellant and attested by the police officials, search of both the gunny bags was conducted. Both the bags were found to contain poppy husk. Two samples of 250 grams each were extracted and on weighment the remaining bulk in each bag came to be 35 Kgs 500 grams each. The samples and the remainder poppy husk were made into parcels, which were sealed with the seal of SI Harmik Singh. The sample seal was also prepared separately and it was handed over to HC Balbir Singh. All the parcels were taken into possession vide a separate recovery memo. Personal search of the appellant was also conducted for which another recovery memo. was prepared. Ruqqa was sent to the police station upon which formal FIR was recorded. Rough site plan was also prepared at the spot. The appellant and the case property were then produced before SI/SHO Gurpreet Singh (PW3), who after verifying all the facts affixed his own seal bearing inscriptions `GS' on the samples and the case property. The case property was then deposited with HC Swarn Singh (PW1). The sample parcels were sent to the Laboratory for analysis through Constable Gurdev Singh (PW2). On receipt of the

report of the Chemical examiner, the investigation of the present case was completed and the challan was submitted against the appellant. He was charged under Section 15 of the Act.

In order to substantiate the charge against the appellant, the prosecution examined PW1 Swarn Singh, a witness of link evidence, Constable Gurdev Singh (PW2), who had tendered in affidavit (Exhibit PA) with regard to link evidence, SI Gurpeet Singh (PW3) who showed compliance of Section 55 of the Act, HC Balbir Singh (PW4), a witness to the recovery, who had reiterated the case of the prosecution and SI Harmik Singh, whose investigation has already been alluded to in the preceding paras.

The stand taken by the appellant as emerges from his statement recorded under Section 313 of the Code of Criminal Procedure is of false implication pleading that he was taken from his house on o24.6.1996 on the pretext that he was having some illegal weapon and after detaining him in illegal custody for two days, the present case was foisted upon him. However, no witness in defence was produced by the appellant.

The learned trial Court after appreciating the entire evidence has convicted and sentenced the appellant as indicated herein above.

Hence this appeal.

I have heard Mr. PS Sekhon, learned counsel for the appellant and Mr. BS Sewak, learned Deputy Advocate General, Punjab. With their assistance I have gone through the entire evidence.

Mr. Sekhon submits that no independent witness was joined in

this case inasmuch as the driver of the private vehicle in which the police party was patrolling has not been produced to give sanctity to the search. Drawing my attention to the statement of the Investigating Officer (Harmik Singh), Mr. Sekhon submits that this witness has stated on oath that he did not know even name of the vehicle's driver. He also admitted that the said driver was not joined as a witness. He also admitted that the place of recovery was a thorough fare and he remained at the spot for about three hours uptill 11-30 PM. According to this witness, the abadi of the village was about 300 yards from the place of recovery and still no effort was made to join the independent witness. The learned counsel has also pointed out certain other discrepancies in the statements of HC Balbir Singh (PW4) in this regard and states that non-joining of the independent witness creates a doubt in the prosecution case and, therefore, the appellant deserves the benefit of doubt on this lapse.

In support of his contentions, the learned counsel places reliance upon the judgments rendered in **Hawa Singh Vs. State of Haryana, 2005(4) RCR (Criminal) 292, Raghbir Singh Vs. State of Punjab, 1999(4) RCR (Crl.) 152 and Teja Singh Vs. State of Punjab, 1996(1) RCR (Crl.) 753**.

Mr. Sekhon then submits that the case of the prosecution is doubtful yet from another angle as no one from the team of the police could tell about the whereabouts of the private vehicle, which was used by the police at the time of recovery. Neither the registration number nor name of owner of the vehicle was known to the police. In this regard, my attention

has once again been drawn to the statement of all the police officials to the recovery.

In support of his aforesaid submissions, the learned counsel relies upon a judgment of this court rendered in **Surinder Singh Vs. State of Punjab, 1997(1) RCR (Crl.) 340**.

Attacking the prosecution case with regard to missing of link evidence, Mr. Sekhon states that the FSL form was neither prepared at the spot nor deposited with the incharge of the Malkhana. This flaw has been taken very seriously by this Court in a latest decision rendered in **Bhola Singh Vs. State of Punjab**, **2005(2) RCR (Criminal) 520**. Dwelling upon his arguments, the learned counsel submits that may be the sample impression chit was prepared at the spot, on which seal impression of SI Harmik Singh was put after sealing the entire case property which included the samples also and subsequently SHO Gurmeet Singh had also put his seal impression on the same, but the said fact by itself would not lend any guarantee to say that there was no chance of tampering with the case property till it reached the hands of the Chemical Examiner. The learned counsel submits that there is no evidence on record to show that SHO Gurmeet Singh had complied with the provisions of Section 55 of the Act and the case property was produced before the Illaqa Magistrate. Had the entire case property been produced before the Illaqa Magistrate on the following day of arrest, there would not have been any scope of tampering with the same at any subsequent stage. He then contends that no doubt, compliance of the provisions of Section 55 is not mandatory in nature but

if it causes prejudice to the accused, then it can be taken against the prosecution. It does cause prejudice coupled with the other flaws and, therefore, this aspect may also be seen with an eye of suspicion.

Mr. Sekhon then submits that the seal of SI Harmeek Singh, which was initially used for sealing all the parcels was handed over to HC Balbir Singh, who was working under him. The other seal used was that of SI Gurmeet Singh, who was incharge of the police station. Both the seals remained with them for a week, as is evident from the evidence. The sample was sent to the Chemical Examiner on 1.7.1996 and, therefore, there was every possibility of tampering with the case property during the interregnum. This flaw again dents the case of the prosecution to a great extent. In support of his submissions, the learned counsel places reliance upon a decision rendered in **Baldev Singh Vs. State of Punjab, 2005(1) RCR Criminal 823**.

Mr. Sekhon has also pointed out certain discrepancies in the case of the prosecution but primarily he sets score by the aforesaid flaws in the case of the prosecution.

Mr. Sewak, learned State counsel, however, refutes the submissions advanced by Mr. Sekhon submitting that there is no reason to disbelieve the statements of the official witnesses, who had no axe to grind against the appellant. Even otherwise, the appellant has not been able to discharge the presumptions envisaged in Sections 35 and 54 of the Act as he has not led any evidence in this regard. According to the learned State counsel, even if there are certain discrepancies with regard to the link

evidence, the same cannot be said to be fatal for the reason that when the samples reached the Chemical Examiner for analysis, all the seals were found intact, as is clear from the report. The appellant, thus, has no escape.

After hearing rival contentions of either side and going through the records minutely, I am of the considered view that the prosecution has not been able to prove the charge against the appellant beyond any shadow of reasonable doubt and as such he deserves acquittal.

No doubt, non-joining of independent witness cannot be said to be fatal in each and every case yet in some of the cases, it has its effect and can certainly create doubt in the very case set up by the prosecution. In my view, this flaw can be considered as an additional fact coupled with other basic flaws. In the case in hand, such is the situation.

The case of the prosecution is that the police party was in a private jeep being driven by a private driver. If any private vehicle is used for patrolling, the State has to make payment to its owner and in this regard the amount is to be withdrawn from the State exchequer. It has to be in black and white. In the present case it is not believable that when SI Harmik Singh had gone for patrolling, he had not made an entry in the Daily Diary Register maintained in the police station. In the case in hand, the Investigating Officer when stepped into the witness box, could not disclose the name of the driver. or owner of the private vehicle. From this it can be safely inferred that the very case of patrolling as set up by the prosecution is doubtful. Even if some margin is given to the prosecution in this regard, joining of the driver of the said private vehicle as an

independent witness would have eroded all the doubts from the mind of the court but the same has not been done. Therefore, in my view, the entire case of the prosecution has to be seen with a pinch of salt. The judgments relied upon by Mr. Sekhon on this aspect would certainly come at the rescue of the appellant.

I am not dislodging the case of the prosecution simply on the flaw of non-joining of independent witness at the time of alleged recovery but in my considered view, the case is doubtful with regard to link evidence as well. Admitted position is that form No.29 was neither prepared at the spot nor deposited with the Moharrir Head Constable. The sample impression chit having the seal impressions of the Investigating Officer and SHO Gurmeet Singh were deposited with the incharge of the Malkhana. This sample impression chit is, however, pasted on the FSL form, which is on the back of the docket sent to the FSL. The two seals used in this case are of the police officials of police station Longowal only where the case was registered. Another admitted fact is that the seal of Harmeet Singh was handed over to H/c Balbir Singh. No doubt, SHO Gurmeet Singh kept his seal with him, but the fact remains that he being incharge of the police station was in the custody of the case property throughout. The samples were sent to the Chemical Examiner after seven days of the alleged recovery. It is clear from the record that the case property was not produced before the Illaqa Magistrate along with the accused on the next day of recovery as is the requirement of Section 55 of the Act. From all these weaknesses it can safely be observed that the chances of tampering

with the same cannot be ruled out. This primarily is the reason that in **Bhola Singh's case (supra)** this Court has taken non-filling of the CFSL form at the spot and thereafter non-depositing thereof with the incharge of the Malkhana as a serious flaw in the link evidence. In the said judgment while dealing with this aspect, this Court observed as under:

> **"In Emma Charlotte Eve v. Narcotic Control Bureau, 2000 (4) RCR (Criminal) 386 & Shaiffullah v. State, 49 (1993) DLT 193,** it was held that "where the seals remained with the police after use and the CFSL form was neither prepared on the spot nor deposited in the Malkhana, such circumstance would be fatal to the prosecution case". Filing of such form at the spot is a very valuable safe-guard to ensure that the seal sample is not tampered with till its analysis by the F.S.L. The CFSL form should not only be prepared and sealed by the officer making seizure at the place where the case property is seized from the accused, it should also be sealed by the S.H.O. to whom the sample and the case property is handed over and the same should accompany the sample to Chemical Examiner. The idea behind taking such a precaution is to complete the material link in the prosecution evidence by eliminating the possibility of the sample being tampered with. The prosecution has miserably failed to prove the link evidence."

In Baldev Singh's case (supra), the other judgment relied upon by Mr. Sekhon is also with regard to the link evidence as in the said case the seal was not handed over to any independent witness and instead the same remained with the police. This Court observed that the prosecution

case was not safe to be relied upon as the chances of tampering with the case property could not be ruled out.

I do not feel the necessity of entering into detailed discussion with regard to the discrepancies pointed out by Mr. Sekhon in the statements of the official witnesses for the reason that the case of the prosecution is held to be doubtful by me on account of vital flaws discussed herein above, which in my considered view are enough to extend the benefit of doubt to the appellant.

The net result now surfaces is that the prosecution has not been able to prove the charge against the appellant beyond any shadow of reasonable doubt and, therefore, the impugned judgment of learned trial Court vide which the appellant stands convicted and sentenced, deserves to be set-aside. Ordered accordingly.

Resultantly the instant appeal stands allowed. The appellant is stated to be on bail. His bail bonds shall stand discharged forth with.

[Virender Singh]
Judge

March __, 2007
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